

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34089

ELMA G. FERNANDEZ,	)	2008 Unpublished Opinion No. 599
	)	
Plaintiff-Appellant,	)	Filed: August 12, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
RUSTY T. AEVERMANN and CONNIE L.	)	THIS IS AN UNPUBLISHED
AEVERMANN, husband and wife,	)	OPINION AND SHALL NOT
	)	BE CITED AS AUTHORITY
Defendants-Respondents.	)	
	)	

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Appeal from the District Court of the Third Judicial District, State of Idaho, Owyhee County. Hon. Gregory M. Culet, District Judge.

Judgment for defendants, affirmed.

Gigray, Miller & Downen; William F. Gigray, Jr., Caldwell, for appellant.

Kormanik, Hallam & Sneed LLP; John R. Kormanik, Caldwell, for respondent.

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GUTIERREZ, Chief Judge

Elma G. Fernandez appeals from the district court's judgment in favor of Rusty and Connie Aevertmann. Specifically, she alleges that the district court erred by allowing the Aevertmanns to retain legal title to her property without going through the foreclosure process. We affirm.

I.

BACKGROUND

Elma G. Fernandez owned a mobile home on a quarter acre of property near Homedale, Idaho.<sup>1</sup> In September, 2003, Fernandez entered into a rental agreement with Rusty and Connie Aevertmann whereby they would live in the mobile home, make repairs to the home, and maintain the property. There would be no other form of rental payments. The Aevertmanns

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<sup>1</sup> Ownership of the mobile home is not in dispute, only the ownership of the property on which it sits gives rise to this appeal.

would be allowed to live in the mobile home for two years, with the possibility of staying for a third year. The Aeevermanns were responsible for obtaining renter's insurance, and paying for utilities, while Fernandez agreed to pay the property taxes. Approximately one month after moving onto the property, the Aeevermanns learned that Fernandez had not paid her property taxes for several years, and that Owyhee County would soon institute foreclosure proceedings and auction the property in order to recover the money owing. The Aeevermanns offered to pay the delinquent taxes for Fernandez, on the condition that Fernandez would repay them. As security for the repayment, Fernandez agreed to sign a quitclaim deed on her property to the Aeevermanns. The Aeevermanns agreed to reconvey the property to Fernandez if she reimbursed them for their payment on the delinquent taxes. In January, 2004, Fernandez signed the quitclaim deed to the Aeevermanns, and the Aeevermanns paid Owyhee County in February for the delinquent property taxes. The Aeevermanns properly recorded the deed after paying the taxes. Fernandez was living in Soda Springs, Idaho, at the time of these negotiations, so all communications took place over the telephone and by mail.

On January 27, 2006, Fernandez, accompanied by an Owyhee County Sheriff's Deputy, tendered a cashier's check in the amount of the delinquent taxes to the Aeevermanns. The Aeevermanns refused to accept the check, telling Fernandez that she was too late. According to the Aeevermanns, the repayment date expired on January 1, 2006. Fernandez insists that her repayment was not due until February 1, 2006.

Fernandez filed a complaint against the Aeevermanns for specific performance of the contract.<sup>2</sup> Fernandez's claim was heard as a bench trial, after which the district court made specific findings of fact. The court noted that the original agreement was intended as a mortgage, but was faced with considerable contradictory evidence as to the day repayment was due. The amount of money to be repaid, the fact that the deed would be returned to Fernandez if paid on time, and the specific land to which the agreement pertained were not in dispute. The district court reserved ruling on the issue of the repayment date.

In a Supplement to Findings of Fact and Conclusions of Law, the district court held that Fernandez failed to meet her burden of proof by clear and convincing evidence on the issue of the repayment date.

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<sup>2</sup> Fernandez also alleged one count of fraud, which was dismissed prior to trial on the Aeevermanns's motion for summary judgment.

After considering the evidence and arguments, this Court simply is at a loss to determine which party to believe or disbelieve on this issue. Accordingly, the plaintiff has not proven by clear and convincing evidence that the payment deadline was February 1, 2006, and as such, she has not proven the elements of her case by clear and convincing evidence.

Judgment was entered in favor of the Aeevermanns. This appeal followed.

## II.

### DISCUSSION

On appeal, Fernandez alleges that the district court erred because it specifically found the agreement between her and the Aeevermanns to be a mortgage, yet its ruling allows the Aeevermanns to maintain legal title to the property without first using the foreclosure process. For relief, Fernandez asks this Court to reverse the holding of the district court and order specific performance of the agreement.

The Aeevermanns challenge Fernandez's appeal, first pointing out that Fernandez violated Idaho Appellate Rule 35(a)(4) by failing to list the issues on appeal. In order to be considered by this Court, the appellant is required to identify legal issues in its opening brief. *Hogg v. Wolske*, 142 Idaho 549, 557, 130 P.3d 1087, 1095 (2006). It is not the duty of this Court to review the record for errors. *Everhart v. Washington County Rd. & Bridge Dep't*, 130 Idaho 273, 274, 939 P.2d 849, 850 (1997). However, that rule may be relaxed if the briefing addressed an issue through authority or argument. *Id.* Although Fernandez failed to include a statement of issues on appeal, we have identified the sole issue raised through argument in her opening brief. Therefore, we will not dismiss Fernandez's appeal for failure to comply with I.A.R. 35(a)(4).

The Aeevermanns also correctly point out that Fernandez's sole issue on appeal, the application of foreclosure proceedings to the quitclaim deed because it was a mortgage, was not raised before the district court. Because the district court characterized the agreement as a mortgage, Fernandez has seized upon that designation on appeal. However, Fernandez only argued below that she had a contract with the Aeevermanns and that they breached said contract by refusing to accept her tender of payment. The sole question of fact was the exact date of repayment, which was a material element requiring proof by clear and convincing evidence in order to make the agreement enforceable pursuant to the statute of frauds. *See Christensen v. Nelson*, 125 Idaho 663, 665-66, 873 P.2d 917, 919-20 (Ct. App. 1994). At no time did Fernandez raise the argument that, even if she was late on her repayment, because the agreement was a mortgage, the proper procedure the Aeevermanns were required to follow was to bring

foreclosure proceedings. Fernandez did not ask the district court to compel foreclosure proceedings.

The longstanding rule of this Court is that we will not consider issues that are presented for the first time on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). The rationale for this rule was first stated by the Supreme Court of the Territory of Idaho in 1867.

It is for the protection of inferior courts. It is manifestly unfair for a party to go into court and slumber, as it were, on [a] defense, take no exception to the ruling, present no point for the attention of the court, and seek to present [the] defense, that was never mooted before, to the judgment of the appellate court. Such a practice would destroy the purpose of an appeal and make the supreme court one for deciding questions of law in the first instance.

*Smith v. Sterling*, 1 Idaho 128, 131 (1867). Although constitutional issues may be considered for the first time on appeal if such consideration is necessary for subsequent proceedings in the case, *Sanchez*, 120 Idaho at 322, 815 P.2d at 1062, the issue Fernandez has raised on appeal, whether the district court erred by failing to *sua sponte* order the Aeevermanns to proceed through foreclosure, is not a constitutional issue. Therefore, it will not be considered for the first time on appeal.

### III.

#### ATTORNEY FEES

Fernandez requests attorney fees on appeal. However, she did not present any authority or substantive argument in support of her request. This Court will not consider issues on appeal, including a request for attorney fees, which are not supported by propositions of law, authority, and argument. *Bingham v. Montane Resource Assocs.*, 133 Idaho 420, 427, 987 P.2d 1035, 1042 (1999). Furthermore, Fernandez is not the prevailing party.

The Aeevermanns also request attorney fees on appeal, pursuant to I.A.R. 41, I.C. § 12-120(3), and I.C. § 12-121. Attorney fees shall be awarded “in any civil action to recover in any commercial transaction unless otherwise provided by law.” I.C. § 12-120(3). The term “commercial transaction” is defined to mean “all transactions except transactions for personal or household purposes.” *Id.* An award under that section is only proper if the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover. *Blimka v. My Web Wholesaler LLC*, 143 Idaho 723, 728, 152 P.3d 594, 599 (2007). It cannot be said that the agreement at issue in this case was a commercial transaction. The dispute

arose from a personal loan between an individual and a married couple, and it was related to the rental of residential property, not commercial property. Although the complaint was filed to enforce a contract, it was not a commercial contract. The loan agreement was for personal purposes; therefore the Aeevermanns are not entitled to attorney fees under I.C. § 12-120(3).

The Aeevermanns also seek attorney fees pursuant to I.C. § 12-121. An award of costs and attorney fees may be granted under I.C. § 12-121 and I.A.R. 41 to the prevailing party and such an award is appropriate when the court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation. *Rendon v. Paskett*, 126 Idaho 944, 945, 894 P.2d 775, 776 (Ct. App. 1995). The Aeevermanns are the prevailing party in this case. Fernandez's counsel, William F. Gigray, Jr., who represented her at trial and on appeal, is a well-seasoned attorney who has practiced law for several decades in the state of Idaho. Nevertheless, the only issue raised on appeal was an issue not previously raised before the district court. We therefore find the appeal to be frivolous.

Fernandez's opening brief on appeal, in addition to omitting a statement of issues on appeal, failed to cite authority in support of the arguments. The opening brief did contain citations to one case and one statute, but these were a passing reference to the basis for the district court's decision, each was cited by and discussed by the district court, and neither was actually argued by Gigray. Fernandez's reply brief was only slightly better, containing one citation already presented in the Aeevermanns's brief, and a second citation to a case from 1896. Idaho Appellate Rule 11.1 states that:

The signature of an attorney or party constitutes a certificate that the attorney or party has read the . . . brief . . . ; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. . . .

Upon violation of the rule, an appellate court may, *sua sponte*, award fees and costs against the party, the party's attorney, or both. I.A.R. 11.1; *see also Sprinkler Irrigation Co. v. John Deere Ins. Co.*, 139 Idaho 691, 698, 85 P.3d 667, 674 (2004). Gigray's argument on appeal on an issue never raised in the trial court and his failure to cite authority shows a complete disregard for Rule 11.1. Issues raised for the first time on appeal generally will not be considered, and this issue clearly did not fit into the exception of a constitutional issue that would be considered for the first time on appeal. Furthermore, the applicability of the exception was never raised. Attorney fees and costs will be awarded to the Aeevermanns, payable by Gigray alone.

**IV.**  
**CONCLUSION**

The judgment of the district court is affirmed. Fernandez raised one issue on appeal, which was not previously raised before the district court; therefore this Court will not consider it for the first time on appeal. Attorney fees and costs are awarded to the Aeevermanns, payable by attorney Gigray.

Judge LANSING and Judge PERRY **CONCUR.**